

July 20, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch:

On July 20th, John Bergmayer and John Gasparini of Public Knowledge, and Adam Goldberg, consultant to Public Knowledge, met with Marc Paul of Commissioner Rosenworcel's office to discuss the above-captioned proceeding.

First, Public Knowledge reacted to the MVPD "app" proposal.¹ PK indicated that it still has questions about the details of this proposal, including whether device makers would be required to ensure that their devices are compatible with some MVPD-provided app, or whether MVPDs would create native apps for existing hardware platforms. PK also noted that the competitive market of consumer electronic devices is not limited to devices that have app stores or user-installable apps, and that a competitive solution should include dedicated and lower-cost devices as well. Additionally, any competitive solution should not be limited to devices and platforms that have already achieved mass adoption but should be open to new entrants, and any solution should ensure that competitive devices or apps have access to the same video content (at the same quality) as well as features (e.g. home recording) that MVPD-supplied devices have. PK also observed that MVPDs' own plans for set-top box deployment and features hardly demonstrate a commitment to move past the cable box.

With those caveats, however, PK noted that it appreciates that the MVPDs have put forward a proposal, and agreed with certain features of that proposal (specifically, that it endorses affirmative Commission rules, and that it permits universal search). PK continues to believe that the Commission can arrive at a set of rules that would benefit consumers which should be acceptable to programmers, competitive device makers, and MVPDs.

Second, PK explained how allowing subscribers to access MVPD programming through the devices and apps of their choice does not infringe any of the exclusive rights granted to copyright holders under § 106 of the Copyright Act.² Just as TiVo does not need to negotiate separate copyright licenses to display MVPD programming via CableCARD, none of the proposals before the Commission would require that competitors seek licenses with each video

¹ See Letter from NCTA, AT&T/DIRECTV, Comcast, and Charter, MB Docket 16-42 (June 17, 2016).

² 17 U.S.C. § 106.

programmer carried in a pay TV bundle. MVPDs, of course, do require licenses from programmers since MVPDs publicly perform video programming with the meaning of copyright law. But Commission regulations of the pay TV industry create the backdrop against which programmers and MVPDs negotiate, and just as CableCARD devices today have access to all one-way video programming a subscriber pays for, any future solution adopted by the Commission that fulfilled the statute would ensure that competitive apps and devices have access to a subscribers's complete video subscription. PK also noted that programmers, by way of programming negotiations, have required that MVPDs reduce the lawful functionality of the devices they provide to their users (e.g., DISH's Hopper DVR). But it should be considered a feature, not a drawback, of a competitive market that third-party competitive devices can offer viewers lawful features that MVPD devices do not provide. At the same time, the Commission can ensure that its rules do not encourage or permit infringement.

Finally, PK noted that the Commission's initial NPRM is compatible with many elements of the MVPD proposal. For example, the Commission's NPRM already contemplates that viewers might access video via apps, and would permit an MVPD to deliver video via IP. The NPRM does not specify what technologies an MVPD must use to support competition, and PK has no stake in what particular technologies are used to provide competition for viewers, provided that they permit real consumer choice and support a range of devices. PK also observed that advocates for increased competition have provided the Commission with legal and technical proposals as to how to ensure that channel line-ups, consumer privacy, advertising limitations, and minority programming are protected in a competitive environment, and will continue to work with the Commission in this respect.

Respectfully submitted,

/s/ John Bergmayer

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cc: Marc Paul